QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2012 SKQB 205**

Date: **2012 05 17**
Docket: Q.B.G. No. 649/2011
Judicial Centre: Saskatoon

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
PURSUANT TO PART 52 OF THE QUEEN'S BENCH RULES

BETWEEN:

AREVA RESOURCE CANADA INC.,

Applicant

- and -

SASKATCHEWAN MINISTRY OF ENERGY AND RESOURCES,

Respondent

Counsel:

Kurtis G. Wintermute	for the applicant
Charita N. Ohashi	for the respondent

FIAT — CURRIE J.
May 17, 2012

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[1] Areva Resources Canada Inc. ("Areva") applies for judicial review of decisions of the Saskatchewan Ministry of Energy and Resources (the "Ministry").

[2] The decisions relate to the calculation of royalties, on the sale of uranium, to be paid by Areva to the Ministry. Areva's obligation to pay royalties is established in *The Crown Minerals Act*, S.S. 1984-85-86, c. C-50.2 (the "Act"). The Act provides for royalties to be calculated in accordance with *The Mineral Disposition Regulations, 1986*, R.R.S. 30/86 (the "Regulations"), which include *The Crown Mineral Royalty Schedule, 1986* ("the Schedule").

[3] Areva asks review of the Ministry's decisions as they relate to calculation of royalties on Areva's sales to non-arm's length purchasers in the years 2006 through 2009. The Schedule provides that the royalties are to be based on the fair market value of the uranium sold. Since fair market value is not necessarily reflected in a non-arm's length sale, the Schedule provides for the calculation of a deemed fair market value based on arm's length sales in the same year. The calculation of the fair market value in this case is directed by s. 27(3)(a) of the Schedule because the sales under consideration were from a pooled inventory of uranium:

> **27**(1) Subject to subsection (2), the fair market value for an arm's length sale of uranium is the price paid by the purchaser to the royalty payer for the uranium.
>
> (2) Subject to section 29, where uranium is sold for consideration other than money, the value of the sale is the greater of the fair market value of the consideration and the fair market value of the uranium.
>
> (3) Subject to section 28 and subsection (5), the fair market value for a sale of uranium that is not at arm's length is deemed to be:
>
> > (a) in the case of uranium that enters into a pooled inventory, the average sale price of all arm's length sales of uranium from that pooled inventory in the current royalty year;
> >
> > (b) in the case of uranium that is re-sold in an arm's length sale without entering a pooled inventory, the sale price of the uranium in the first arm's length sale; and
> >
> > (c) in the case of uranium that is sold and subsequently consumed, the average sale price for all sales of uranium from the royalty payer to arm's length purchasers in the current royalty year.

> (4) For the purposes of calculating the gross sales of the royalty payer in the current royalty year, an estimated average sale price must be used as an interim value of sales until the gross sales have been determined for the current royalty year.
>
> (5) The minister may approve a sale price of uranium that is agreed upon by a royalty payer and a purchaser who are not dealing with each other at arm's length. [Emphasis added]

[4] Areva and the Ministry calculate "the average sale price of all arm's length sales" differently. The parties' approaches can be illustrated using an example in which a producer, in a given year, has arm's length sales of uranium under three contracts as follows:

> Contract 1 is for the sale of 1,000 pounds of uranium at $50 per pound.
>
> Contract 2 is for the sale of 2,000 pounds of uranium at $40 per pound.
>
> Contract 3 is for the sale of 3,000 pounds of uranium at $60 per pound.

[5] Areva calculates the average sale price by adding $50, $40 and $60 and dividing by 3 ($150/3 = $50). Areva says that the result, $50 per pound, is the average sale price of all arm's length sales – the average of the three contract sale prices.

[6] The Ministry calculates the average sale price by first determining the total revenue for the uranium sold ($50,000 + $80,000 + $180,000 = $310,000). The Ministry then divides that total by the number of pounds sold ($310,000/6,000 = $53.33). The Ministry says that the result, $53.33 per pound, is the average sale price of all arm's length sales – the weighted average sale price of all arm's length sales, as the Ministry puts it.

[7] Areva filed its returns and paid royalties. The Ministry, acting with power delegated from the minister, has issued decisions for each of 2006, 2007, 2008 and 2009 in which it directs that the royalties are to be calculated using the Ministry's approach,

resulting in additional money being owed to the Ministry by Areva. The net difference, over the four years, runs to millions of dollars.

[8] Areva applies for judicial review of those decisions of the Ministry, asking relief by way of:

(a) *certiorari* quashing the Ministry's decisions and notices flowing from the decisions;

(b) *mandamus* requiring the Ministry to calculate the royalties according to Areva's approach;

(c) a declaration that the Ministry's decisions and notices are in error; and

(d) a declaration as to the proper method to be used in calculating the fair market value of all arm's length sales for the purpose of s. 27(3)(a) of the Schedule.

Standard of Review

[9] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada refined two options for the standard of review: correctness and reasonableness. At para. 55, the court provided the following guide to selecting the appropriate standard of review:

> [55] A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
>
> - A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
> - A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).

> • The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

Privative clause

[10] The Ministry acknowledges that there is no privative clause applicable to this matter. The Ministry adds, correctly, that the absence of a privative clause does not necessarily mean that the standard of review is correctness: *Dunsmuir* at para. 52.

Discrete and special administrative regime

[11] The Supreme Court confirmed in *Pushpanathan v. Canada (Minister of Citizenship and Immigration*), [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193, at paragraph 32, that expertise is "the most important of the factors that a court must consider in settling on a standard of review". The expertise, of course, must relate to the subject at hand. The Supreme Court said in *Barrie Public Utilities v. Canadian Cable Television Association*, 2003 SCC 28, [2003] 1 S.C.R. 476, at paragraph 16:

> 16 Deference to the decision maker is called for only when it is in some way more expert than the court and the question under consideration is one that falls within the scope of its greater expertise .... [Emphasis added]

[12] The point of deference arising from the decision maker's expertise is that the decision maker is more expert than would be the court in the area under consideration. It is for this reason that the Supreme Court in *Dunsmuir* at paragraph 54 referred to the decision maker having "particular familiarity" with the subject of the decision.

[13] The minister is empowered and obliged under the Act to make decisions

and to exercise discretion in a variety of areas of mining and energy – decisions that require a certain degree of familiarity with those areas. Further, the person in the Ministry who most directly is involved in this matter is Kevin Wog, who describes his experience over the past seven years as including "auditing the production, sales and expenditures associated with the extraction of oil, gas, potash, uranium, coal, gold and other non-renewable resources in Saskatchewan, in order to ensure the accurate and timely collection of provincial resource royalties and taxes and compliance with a variety of royalty and tax legislation."

[14] There is no question, then, that the minister – and, by delegation, the Ministry – has expertise in mining and energy, including the uranium industry, that the court has not. The minister and the Ministry, however, do not have any particular expertise in relation to interpreting the meaning of "the average sale price of all arm's length sales" as specified in the Schedule. Interpreting the phrase is not aided by the minister's expertise or by the Ministry's expertise. The interpretation does not call for such expertise. It calls for an examination of a provision that is not necessarily exclusive to mining and energy, or to the uranium industry, or to auditing. The minister and the Ministry have no pertinent expertise to bring to the interpretation. The question under consideration, then, does not fall within the scope of the minister's, or the Ministry's, greater expertise.

[15] The Ministry points to s. 85(1) of the Regulations:

> **85**(1) The minister shall have the power to determine from time to time any questions that may arise in determining the amount of the royalty payable pursuant to a lease in any particular case ....

[16] The Ministry says that this provision indicates that the minister has considerable discretion in determining how to calculate royalties and the elements of

royalties, a discretion that should lead to deference in considering the Ministry's decisions as to how to calculate "the average sale price of all arm's length sales". I do not share that view of s. 85(1). To the extent that the provision is relevant to this review, the provision is what gives the minister and the Ministry the authority to make the decisions that now are subject to judicial review. The provision is not itself an indicator that the decisions attract deference.

[17] The Ministry also points to several places in the Schedule where the minister is expressly given discretion to determine matters. The Ministry says these provisions indicate that greater deference overall should be given to what the minister does under the Schedule. I do not share that view. While the governor-in-council chose to give the minister discretion – and therefore suggest deference – elsewhere, the governor-in-council did not choose to do so in relation to s. 27(3)(a).

[18] The Ministry further notes that, in other circumstances under the Act, a producer is afforded a right to appeal from a decision of the minister. The Ministry argues that the legislature's choice not to provide a right of appeal with respect to the manner of calculating "the average sale price of all arm's length sales" under s. 27(3)(a) indicates the legislature's intention that the minister's decisions in that regard are entitled to more deference. I am not persuaded by this argument. The legislature's choice not to provide a right of appeal on the topic as readily could indicate the legislature's view that the calculation of the average sale price would be a straightforward, simple arithmetic exercise that would not be the subject of dispute.

[19] The Ministry cites the decision of the Supreme Court of Canada in *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539. There is, however, a fundamental difference between the circumstances of that case and of this case. In *C.U.P.E.* the decision under review related to selection of a labour arbitrator. The court

acknowledged that the minister knows more about labour relations and its practitioners than do the courts, and so the court concluded that deference was appropriate. As well, the court recognized that the legislative provision empowering the selection specified that the minister had discretion to select "a person who is, in the opinion of the Minister, qualified to act". In the case at hand, the minister knows more about the uranium industry than the does court, but the decision under review is not one to which the minister can apply that knowledge. It is not a decision in an area with which the Ministry has particular familiarity.

[20] Likewise, the circumstances in *Re Central Canada Potash Co. Ltd. and Minister of Mineral Resources of Saskatchewan* (1972), 32 D.L.R. (3d) 107, [1972] S.J. No. 344 (C.A.) (QL), also relied on by the Ministry, differ fundamentally. In that case the minister was using his superior knowledge of the potash industry to exercise his discretion in determining whether to issue a potash production licence. That was a case of the minister making a discretionary decision in an area in which the minister had particular familiarity.

[21] Expertise of the decision maker – an expertise that the court does not have and that relates to the decision under review – is the most important factor to consider in determining the standard of review. The minister and the Ministry have expertise in the area of mining and energy, and specifically in relation to the uranium industry, that the court does not have. The minister and the Ministry, however, do not have expertise in relation to the decisions under review, being the interpretation of "the average sale price of all arm's length sales". Making that interpretation does not require the expertise that the minister and the Ministry have.

[22] The decision under review, then, was not made by a decision maker with relevant expertise. The decision was not made in the context of a discrete and special

administrative regime in which the decision maker has special expertise.

[23] Deference is not suggested by the regime or context in which the decision was made.

Nature of the question of law

[24] The Supreme Court of Canada said in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paragraph 30:

> 30 ... There is authority that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" ... This principle applies unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply, i.e., "constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, ... questions regarding the jurisdictional lines between two or more competing specialized tribunals [and] true questions of jurisdiction or *vires*" ....

[25] Applying this approach to the case at hand, deference would be suggested if the Ministry, in making the decisions under review, had been "interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity", and if the subject of the decisions were not in the categories identified at paragraph 30 of the *Alberta* case.

[26] The Ministry was interpreting its own statute. As I have discussed, though, the Ministry does not have particular familiarity with the subject of the decisions. The interpretation of "the average sale price of all arm's length sales" is outside the Ministry's area of expertise. This consideration does not favour deference.

Conclusion as to standard of review

[27] The most influential of the factors to consider in determining the standard of review is the matter of the expertise of the decision maker. In this case that factor is determinative. For the above reasons, I conclude that the standard of review is correctness.

Correctness of the Ministry's decisions

[28] The Supreme Court described the nature of a review on the standard of correctness in *Dunsmuir* at paragraph 50:

> [50] ... When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[29] The determination under review is the Ministry's decision that "the average sale price of all arm's length sales" is "the weighted average sale price of all arm's length sales". If that decision is not correct, then the correct meaning of "the average sale price of all arm's length sales" must be determined. Areva suggests that the correct meaning is "the average of the contract sale prices".

[30] The issue of interpretation does not revolve around the meaning of the word "average". The issue revolves around the question of what items are to be averaged – the contract sale prices or the individual prices of each pound of uranium sold.

[31] The natural starting point is an examination of the words under consideration. Each of subsection (a), (b) and (c) refers to "sale price". Subsection (b) refers to "sale price" without modification: "... the fair market value for a sale of uranium ... is deemed to be ... the sale price of the uranium in the first arm's length sale ...." This

wording does not direct the reader's mind to a weighted price. Rather, the wording directs the reader's mind to the contract sale price.

[32] Subsections (a) and (c) also refer to "sale price", modified by the word "average". Again, the wording does not direct the reader's mind to a weighted price. Rather, the plain reading is that the subsections refer to an average of the contract sale prices. The meaning is that the sale price of each of the arm's length sales in that year is to be identified, and then those prices are to be averaged.

[33] In contemplating this interpretation I note the inclusion, in other parts of the Schedule, of references to quantity of uranium. This inclusion means that the governor-in-council, in drafting the Schedule, was aware of that factor. The governor-in-council, though, did not see fit to specify a reference to quantity in s. 27(3).

[34] This interpretation of s. 27(3)(a) has the value of representing the plain meaning of the words as written. In contrast, the interpretation advanced by the Ministry requires reading an extra factor into the subsection. Mr. Wog describes the Ministry's calculation as being "the average based on the weighted actual price per pound of uranium sold". The Ministry's approach requires reading into s. 27(3)(a) the additional factor of weighting.

[35] Nowhere in s. 27(3)(a) is there a direction to introduce weighting into the average. There is no direction to factor the total revenue under each contract, and to add the total number of pounds of uranium sold, and only then to perform the division process that results in an average. Such an exercise is not suggested by the wording of s. 27(3)(a). The wording of s. 27(3)(a) suggests, instead, that "the average sale price of all arm's length sales" means "the average of the contract sale prices".

[36] There is evidence before me as to the context in which the words under

consideration apply. The evidence establishes that the arm's length contracts for the sale of uranium typically are complex. A small percentage of uranium sales are by way of short-term contracts, and typically the parties to these contracts set the price based simply on the market price at the time. The larger percentage of sales, however, are by way of long-term contracts in which prices, as described by Tony Van Burgsteden, Areva's director of finance and accounting, may be "composed of complicated formulas referencing both spot and long-term market price indicators, with escalation clauses built in, floor and ceiling prices and penalty clauses."

[37] The market price indicators reflect many factors, including the quantity of uranium being sold. Quantity does not consistently affect price. That is, a greater quantity of uranium is not always sold at a lower price, and a lesser quantity of uranium is not always sold at a higher price.

[38] Ultimately, then, the price that is negotiated on each contract reflects, among many other factors, the quantity of uranium being sold. That is, to the extent that quantity is a factor in establishing the fair market value of uranium, each contract price represents a process that has take that factor into account.

[39] Areva argues that this circumstance means that the Ministry's approach to calculating "average sale price" is incorrect, and further that there can be no logic or reason to the Ministry's interpretation of s. 27(3)(a). I am not persuaded that this circumstance means that there is no logic or reason to the Ministry's approach. The circumstance, however, does support the conclusion (suggested by the plain meaning of the words in s. 27(3)(a)) that there is no reason to read an extra factor into the subsection by inserting the factor of weighting, which reflects quantity.

[40] In explaining its approach, the Ministry focuses on its perception of what would be the most accurate and fair method of determining the fair market value of the

uranium sold at arm's length. That, however, is not the subject of this review. In determining the correctness of the Ministry's decisions, I am not seeking to identify the most accurate and fair method of determining the fair market value of the uranium. Rather, I am seeking to identify the method of determining the fair market value that has been chosen by the governor-in-council, as expressed in s. 27(3)(a).

[41] The governor-in-council having selected and specified what items are to be averaged to reach the deemed fair market value, there is no room for using a different set of items, even if a persuasive argument can be made that doing so would be more accurate and fair.

[42] For the above reasons I conclude that the Ministry's interpretation is not correct. The correct interpretation of s. 27(3)(a) is that "the average sale price of all arm's length sales" means "the average of the contract sale prices", as suggested by Areva, not "the weighted average sale price" as suggested by the Ministry.

Reasonableness of the Ministry's decisions

[43] The Supreme Court described the nature of a review on the standard of reasonableness in *Dunsmuir* at para. 47:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[44] If the standard of review in this matter were reasonableness, I would conclude that the Ministry's decisions fall into the category of reasonableness and should not be set aside. As is evident from the above discussion, I find the Ministry's interpretation to be justified, transparent and intelligible. There is logic and reason to it. One can follow the reasoning process of the Ministry in applying this interpretation.

[45] Further, the results of the Ministry's decisions fall into an acceptable range. In part, this conclusion is demonstrated by the fact that for some years the Ministry's approach results in a higher average price than does Areva's approach, but for other years the Ministry's approach results in a lower average price than does Areva's approach.

Futility

[46] The Ministry says that, in any event, I should dismiss Areva's application on the basis of futility. In so saying, the Ministry relies on the principle of law described by the Supreme Court in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1, at paragraph 109:

> 109 ... Prerogative relief should only be refused on the ground of futility in those few instances where the issuance of a prerogative writ would be effectively nugatory. For example, a case where the order could not possibly be implemented. . .

[47] The Ministry says that the principle of futility applies in this case because the minister may implement the provisions of s. 28(1) of the Schedule. Section 28 provides:

> **28**(1) Notwithstanding section 27, if, in the minister's opinion, the sales price to be included in the calculation of the gross sales of the royalty payer does not accurately reflect the fair market value, and it is not possible to determine the fair market value in accordance with section 27, the minister may deem a value that, in the minister's opinion, accurately reflects the fair market value.

> (2) Where the minister deems a value in accordance with subsection (1), the minster shall provide written notice of it to the royalty payer.
>
> (3) A royalty payer shall have 60 days from the date of the notice in subsection (2) to explain why the royalty payer's sale price is fair market value for that sale.
>
> (4) Following the expiration of the 60 day period mentioned in subsection (3), the minister shall inform the royalty payer of the value that, in the minister's opinion, represents the fair market value of the uranium sold or consumed.

[48] The Ministry says that, should I rule in favour of Areva on this application, the minister may deem a value under s. 28(1) that is calculated in accordance with the Ministry's approach. Thus, says the Ministry, any order by way of *certiorari* or *mandamus* that I might make would be rendered nugatory.

[49] In so saying, the Ministry interprets the phrase "in the minister's opinion" as applying to both elements of s. 28(1). That is, the Ministry says that the minister may deem a value if:

> (a) in the minister's opinion, the sales price to be included in the calculation of the gross sales of the royalty payer does not accurately reflect the fair market value; and
>
> (b) in the minister's opinion, it is not possible to determine the fair market value in accordance with section 27.

[50] The Ministry says that the minister may form the opinion that, notwithstanding an order of this court as to how to make a determination under s. 27, it is not possible to determine the fair market value in accordance with s. 27.

[51] Areva disagrees with this interpretation of s. 28(1). Areva says that the phrase “in the minister’s opinion” applies to only the first element, so that the minister may deem a value only if:

> (a) in the minister’s opinion, the sales price to be included in the calculation of the gross sales of the royalty payer does not accurately reflect the fair market value; and
>
> (b) it is not possible to determine the fair market value in accordance with s. 27.

[52] Areva says that if the court directs the correct manner of determining the fair market value under s. 27, then necessarily it is possible to make that determination, and the minister will not be empowered to deem a value in a manner different from the court’s direction.

[53] I need not decide this question of interpretation, because the foundation for the futility argument is not established. The minister has not yet formed opinions as described in s. 28. It may be that ultimately the minister will not reach the opinions asserted by the Ministry. Indeed, in his affidavit Mr. Wog does not describe the invocation of s. 28 as a certainty. He says that the minister “would, in all likelihood, give very serious consideration to invoking section 28 ....” The prospect of the minister forming the opinions under s. 28 is far from certain.

[54] The foundation for the futility argument not being established, I decline to dismiss the application on that basis.

Conclusion

[55] The decisions of the Ministry must be set aside, and the matter remitted to

the Ministry for calculation in accordance with the correct approach. Since I will make such an order, and since this is not a matter of the Ministry refusing or neglecting to make the calculation, there is no need for an order by way of *mandamus*. This is a matter of whether the calculation was performed correctly, a matter that can be addressed fully with the order by way of *certiorari*.

[56] I order that:

(a) The decisions and notices of the Ministry dated:

(i) September 16, 2009;

(ii) October 1, 2009;

(iii) January 6, 2010; and

(iv) July 5, 2010;

by which the Ministry revised the royalty calculations for the years 2006, 2007, 2008 and 2009 relating to sales of uranium that were not at arm's length, are set aside.

(b) The subject of the decisions and notices are remitted to the Ministry for recalculation of those royalties so that, in calculating the fair market value under s. 27(3)(a) of the Schedule, the average sale price of all arm's length sales is the average of the contract sale prices rather than the weighted average sale price.

(c) The applicant, Areva Resources Canada Inc., will have the costs of this application.

J.

G.M. Currie